

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31859
Docket No. MW-31977
97-3-94-3-349**

The Third Division consisted of the regular members and in addition Referee Charles J. Chamberlain when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE:(
(CSX Transportation, Inc. (former
(Seaboard System Railroad)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. T. M. Wisecup for violation of Rule 501 in connection with the alleged misuse of the Corporation Lodging Consultants (CLC) card on March 28, 29, April 9, 10, 11, 23, 24, 25, 26, 27, May 6, 7, 20, 21, 22, 23, 24, June 17, 18, 19, 20, 21 and 22, 1993 was unreasonable and excessive [System File B-TC-8998/12(93-940) SSY].**
- (2) The Claimant shall be reinstated to service with all seniority and benefits unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant held seniority as an Assistant Foreman and was assigned to various system gangs which were established in accordance with the SPG Agreement.

SPG gangs are created to perform production work throughout the entire CSXT system without regard to seniority districts. Employees assigned to such gangs are required to live away from home during their regular work periods and are provided lodging and meal allowances when away from home.

The employees assigned to such gangs are issued a credit card by Corporate Lodging Consultants, Inc. (CLC) for their use in obtaining lodging at pre-approved establishments over the entire railroad system.

The record shows that on July 12, 1993, the Claimant was charged for alleged violation of Carrier's operating Rule 501 for alleged use of the Carrier's corporate lodging card to obtain motel rooms on rest days away from his work site.

A formal Investigation was conducted on July 22, 1993, at Huntington, West Virginia. A review of the transcript reveals that there is no disagreement as to the dates in the dispute. The Claimant did not deny or take issue with the factual evidence presented by the Carrier concerning the use of the credit card on the dates in question.

The Claimant's position throughout the dispute is based on what he says is a misunderstanding of the regulations governing the use of the credit card issued for employees assigned to the system gangs.

The position of the Carrier throughout the dispute and subsequent to the Investigation was that the action of the Claimant was dishonest and fraudulent and, accordingly, in violation of Rule 501.

After a thorough review of the evidence and testimony of record, it is quite clear that the Claimant did not have a clear understanding of the rules and regulations governing the use of the Carrier's CLC credit card.

This is quite clear in his response to the question concerning the \$40.00 travel expense that employees receive in connection with end of workweek travel. He stated "I did not realize that we got the travel expense until about a month ago."

While it may be difficult to conceive that the Claimant did not understand what he was or was not entitled to under the Agreement Rules in effect, it is quite clear that the record reveals that to be the case.

Accordingly, we are of the opinion that Claimant's dismissal from service is excessive. His removal from service should clearly remind him that it is essential that he get a better understanding on what the Rules and regulations provide in connection with his work assignment. To ensure that this decision will serve its remedial purpose, we are accordingly returning the Claimant to service with all seniority and other rights unimpaired, but without pay for time lost.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 4th day of March, 1997.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 31859, DOCKET MW-31977
(Referee Chamberlain)

The Majority clearly erred when it found that "...the Claimant did not have a clear understanding of the rules and regulations governing the use of the Carrier's CLC credit card." The Majority attempted to defend its erroneous conclusion by finding that because the Claimant testified that he was only recently aware that he received a \$40.00 travel expense, **he had to be telling the truth** even though his self-serving statements were unsupported and uncorroborated.

The Majority rubbed salt in the wound when it held:

"While it may be difficult to conceive that the Claimant did not understand what he was or was not entitled to under the Agreement Rules in effect, it is quite clear that the record reveals that to be the case."

The Majority came to this palpably erroneous conclusion in spite of the fact the Carrier had established by substantial evidence that the Claimant had been instructed not only in writing, but also verbally as to the proper use of the CLC credit card. If nothing else, **common sense** dictates that an employee with 15 years of service in this industry either knows or should know that the use of a Carrier furnished credit card for personal reasons would most certainly be viewed as a fraudulent, dishonest act, as well as larceny.

Even though the Majority acknowledged that it was difficult to conceive that the Claimant did not understand what he was or was not entitled to under the Agreement Rules in effect, surprisingly, it improperly substituted its judgment for that of the Hearing Officer who likewise found the Claimant's story difficult to swallow.

Bearing upon credibility determinations are such factors as bias, self interest, demeanor and testimonial capacity. The Hearing Officer resolved the credibility question against the Claimant. The only way for the Majority to sustain the claim was to reject the credibility determination made by the Hearing Officer. The Hearing Officer's rejection of the Claimant's story is not per se arbitrary, unreasonable and capricious. Even if the Hearing Officer believes the wrong man where the issue is narrowed to credibility alone, this Board has repeatedly held that it is unable to resolve such conflicts. Rightly or wrongly it is firmly established by a host of Awards that this appellate tribunal shall not resolve pure credibility questions. See Second Division Awards 6408, 6604, 7144, 7196 and 7542; see also Third Division Awards 14556, 19696 and 21258. The principle is established, it is understood and acknowledged by the parties and it should have been

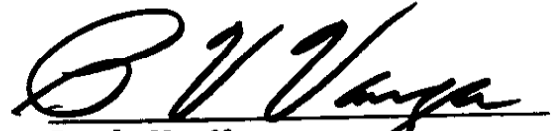
dispositive of the instant claim. Given the fact the record evidence weighed heavily against the Claimant, this claim should have been denied.

At least the Majority had the wisdom not to reward the Claimant for his dishonesty by awarding him backpay.

For all of the foregoing reasons, we dissent.


Michael C. Lesnik


Martin W. Fingerhut


Paul V. Varga